

MONTANA FIFTH JUDICIAL DISTRICT COURT, MADISON COUNTY  
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DAVID F. KELLEY,	)	Cause No. DV-29-10-70
	)	
Plaintiff/Petitioner,	)	<b>DECISION AND ORDER RE:</b>
	)	<b>DEFENDANTS' MOTION TO</b>
vs.	)	<b>DISMISS</b>
	)	
MARC GLINES, JIM McNALLY, GARY	)	
CROY, MICHAEL McKITRICK, and BRETT	)	
OWENS, in their official capacity as members	)	
of the Board of Trustees of the Ennis School	)	
District, and DOUGLAS WALSH, personally	)	
and as Superintendent of the Ennis School	)	
District,	)	
	)	
Defendants/Respondents.	)	

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**FILED**

AUG 10 2011

BUNDY K. BAILEY  
Clerk of Court  
By *Bundy K. Bailey*  
Deputy Clerk

On December 23, 2010, Defendants/Respondents Marc Glines ("Glines"), Jim McNally ("McNally"), Gary Croy ("Croy"), Michael McKitrick ("McKitrick"), Brett Owens ("Owens"), and Douglas Walsh ("Walsh") (collectively "Defendants") filed a Motion to Dismiss and Brief in Support. On January 4, 2011, Plaintiff/Petitioner David Kelley ("Kelley") filed an Answer Brief in opposition to Defendants' Motion to Dismiss. On January 18, 2011, Defendants filed a Reply Brief in support of their Motion to Dismiss. On July 21, 2011, the Court held a hearing on Defendants' Motion to Dismiss. Elizabeth Kaleva and Megan Morris appeared at the hearing on behalf of Defendants. Kelley appeared at the

hearing pro se. From reviewing the parties' briefs, filings, and arguments, the Court is fully advised.

## **BACKGROUND**

According to Kelley, Defendants engaged in a fraudulent contractual scheme that allowed Walsh to: (A) maintain his full-time position as Superintendent of the Ennis School District ("District"); and (B) collect benefits from the Montana Teachers' Retirement System ("TRS"). Kelley's 3d Amend. Compl. ¶¶ 7, 11-12, 14-15, 17, 22, 32, 53, 59 (Dec. 10, 2010). Kelley contends Defendants effectuated this fraudulent contractual scheme by nominally changing Walsh's job title from: (A) full-time Superintendent; to (B) 1/3 Superintendent, 2/3 Consultant/Bus Supervisor. Kelley's 3d Amend. Compl. ¶ 14. In an attempt to expose the fraud and obtain legal redress therefore, Kelley, as a taxpayer and member of the District, brought this action against Defendants. Kelley's 3d Amend. Compl. ¶¶ 7-115.

In his Third Amended Complaint, Kelley asserts the following nine counts: (A) Count 1 – Fraudulent Contracts Contrary to Public Policy; (B) Count 2 – Actual Fraud; (C) Count 3 – Constructive Fraud; (D) Count 4 – Unjust Enrichment; (E) Count 5 – Unlawful Expenditure of Tax Dollars; (F) Count 6 – Failure to Comply with Montana's Open Meeting Law; (G) Count 7 – Failure to Perform Duties as Trustees; (H) Count 8 – Denial of Statutorily Guaranteed Right to Vote; and (I) Count 9 – Fraudulent Collection of Taxes. Kelley's 3d Amend. Compl. ¶¶ 7-115.

In his prayer for relief, Kelley asks the Court to: (A) "declare the alleged 'Consultation,' 'Transportation Consultation,' and 'Bus Supervisor' contracts entered into [between Defendants and Walsh] to be fraudulent, invalid[,] . . . in violation of [Montana] law[ ], contrary to the public policy of the State of Montana, an illegal use of taxpayers[']

money[,] . . . null[,] and void;” (B) “[i]ssue an immediate writ of mandamus directing [Defendants] to comply with the dictates of [§ 2-3-104, MCA, § 2-3-203, MCA, and § 20-9-213, MCA];” (C) “[i]ssue an order enjoining the future payment of sums in violation of [§ 20-7-701, MCA, § 20-9-208(2)(a)(i), MCA, and § 20-10-143, MCA] . . . ;” (D) “[i]ssue an order enjoining any future payment of sums pursuant to any illegal contracts and reimbursement of sums paid to date pursuant to those contracts;” (E) “[order] [t]hat [Defendants] be removed from office as per [§ 20-3-310, MCA and § 20-3-332, MCA];” (F) “disallow [Defendants] from being defended or indemnified by the . . . District or any other governmental entity for any money judgments or legal fees to which they may be subject as a result of this suit . . . ;” (G) “[a]ward [Kelley] his reasonable costs;” and (H) “[g]rant all other relief which justice and equity might require, including punitive damages.” Kelley’s 3d Amend. Compl. pp. 21-22.

Presently at issue is whether Kelley’s Third Amended Complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted. Rule 12(b)(6), M.R.Civ.P.; Defs.’ Mot. to Dismiss 1-3 (Dec. 23, 2010).

### **SUMMARY OF THE PARTIES’ BRIEFS**

#### **I. Defendants’ Motion to Dismiss (Ct. Doc. 67)**

Defendants contend Kelley’s Third Amended Complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted because: (A) “[Kelley] has failed to exhaust the administrative remedies required to file claims challenging decisions of the [District’s] Board of Trustees [(“Board”)] . . . ;” (B) “[Kelley’s] claims are premised on allegations that fall significantly beyond the applicable statute of limitations;” (C) “[Kelley] has failed to name necessary parties . . . ;” (D) “[s]ome of . . . Kelley’s claims . . . are moot because the District has proactively addressed . . . Kelley’s challenges;” (E) “[Kelley] has

failed to establish that he has standing . . . ;” (F) “Walsh is immune from . . . suit;” and (G) “[Kelley] requests remedies . . . that cannot be granted as a matter of law.” Defs.’ Mot. to Dismiss 2. This Decision and Order will address Defendants’ contentions, and Kelley’s responses thereto, in turn.

## II. Defendants’ Brief in Support of Motion to Dismiss (Ct. Doc. 68)

### A. Exhaustion of Administrative Remedies<sup>1</sup>

In support of their contention that “[Kelley] has failed to exhaust the administrative remedies required to file claims challenging decisions of the [Board] . . . ,” Defendants argue that: (1) “[t]he nucleus of . . . Kelley’s Third Amended Complaint [pertains to] decisions made by the Board;” (2) to challenge decisions made by the Board, an action must be filed with the Madison County Superintendent within 30 days of the challenged decision; and (3) Kelley has not filed an action challenging the Board decisions at issue with the Madison County Superintendent. Defs.’ Br. in Support of Mot. to Dismiss 4-6 (citing § 20-3-210, MCA; *Good Schools Missoula, Inc. v. Missoula County Public School District No. 1*, 2008 MT 231, ¶¶ 22, 24, 344 Mont. 374, 188 P.3d 1013; Aff. Marc Glines ¶ 9 (Sept. 22, 2010); Aff. Ginger Martello ¶ 8 (Sept. 22, 2010)).

### B. Statute of Limitations<sup>2</sup>

In support of their contention that “[Kelley’s] claims are premised on allegations that fall significantly beyond the applicable statute of limitations,” Defendants argue that: (1) actions for relief based on fraud must be filed within two years; (2) the allegations upon which Kelley’s fraud claims are based “date back to 2001;” and (3) this action was not filed

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<sup>1</sup> This portion of Defendants’ Motion to Dismiss applies to Counts 1, 2, 3, 4, 5, 7, 8, and 9 of Kelley’s Third Amended Complaint. Defs.’ Br. in Support of Mot. to Dismiss 4-6 (Dec. 23, 2010).

<sup>2</sup> This portion of Defendants’ Motion to Dismiss applies to Counts 1, 2, 3, and 9 of Kelley’s Third Amended Complaint. Defs.’ Br. in Support of Mot. to Dismiss 6-9.

until August 23, 2010. Defs.' Br. in Support of Mot. to Dismiss 6-9 (citing § 27-2-102, MCA; § 27-2-203, MCA).

C. Necessary Parties<sup>3</sup>

In support of their contention that “[Kelley] has failed to name necessary parties . . . ,” Defendants argue that: (1) the Board is a “necessary party” because: (a) the individual trustees named as defendants do not have the authority to act on their own behalf; (b) the individual trustees named as defendants are immune from liability; (c) the decisions at issue were made by the Board as a whole; and (d) all of the trustees who were on the Board when the decisions at issue were made have not been named as defendants; and (2) the District is a “necessary party” because: (a) “Kelley . . . has alleged that [t]his [action] is for the benefit of the District;” and (b) “[w]ithout the District as a party to this action, . . . Kelley is not entitled to the relief he seeks.” Defs.' Br. in Support of Mot. to Dismiss 3-4 (citing § 20-3-322(4), MCA; § 20-3-332, MCA; *School District No. 2 v. Richards*, 62 Mont. 141, \_\_\_, 205 P. 206, \_\_\_ (1922)).

D. Moot<sup>4</sup>

In support of their contention that “[s]ome of . . . Kelley’s claims . . . are moot because the District has proactively addressed . . . Kelley’s challenges,” Defendants argue that Count 6 is moot because: (1) “[t]he consequence for violating the Open Meeting Law[ ] [(i.e. § 2-3-203, MCA)] is a judicial declaration that the decisions made in the course of the violation are void;” and (2) the meeting that was allegedly held in violation of the Open Meeting Law (i.e.

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<sup>3</sup> Defendants have not identified the Counts to which this portion of their Motion to Dismiss applies. Defs.' Br. in Support of Mot. to Dismiss 3-4.

<sup>4</sup> This portion of Defendants' Motion to Dismiss applies to Count 6 of Kelley's Third Amended Complaint. Defs.' Br. in Support of Mot. to Dismiss 9-10.

the August 9, 2010 hearing) was re-heard, in open session, on August 31, 2010. Defs.' Br. in Support of Mot. to Dismiss 9-10 (citing § 2-3-213, MCA; Aff. Marc Glines ¶ 7).

E. Standing<sup>5</sup>

In support of their contention that “[Kelley] has failed to establish that he has standing . . . ,” Defendants argue that: (1) “[i]n and of itself, being a taxpayer within the District is not enough to establish standing – there must also be a ‘personal interest and injury beyond that common interest of all citizens and taxpayers;’” (2) “Kelley has failed to allege any specific injuries beyond that which all taxpayers in the . . . District would experience if any of his allegations . . . were true . . . ;” (3) “[TRS], alone, has the authority to administer and operate the retirement system;” (4) “[i]n order to have standing to bring a claim for a violation of the bidding requirements for public contracts, the claim must seek a remedy ‘that will protect the rights of the aggrieved taxpayer from the *potential* harm that will occur;’” and (4) no “prospective relief” can be afforded to the contracts Kelley seeks to void because the contracts have already been performed. Defs.' Br. in Support of Mot. to Dismiss 12-14 (citing *Olson v. Department of Revenue*, 223 Mont. 464, 469, 726 P.2d 1162, 1166 (1986); *Fleenor v. Darby School District*, 2006 MT 31, ¶¶ 8-9, 331 Mont. 124, 128 P.3d 1048; § 19-20-102, MCA; § 19-20-201, MCA; *Debcon v. City of Glasgow*, 2001 MT 124, ¶ 44, 305 Mont. 391, 28 P.3d 478).

F. Immunity<sup>6</sup>

In support of their contention that “Walsh is immune from . . . suit,” Defendants argue that: (1) “government entity employees are immune from suit where their employer remains a

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<sup>5</sup> This portion of Defendants' Motion to Dismiss applies to Counts 1, 2, 3, 4, 5, 7, 8, and 9 of Kelley's Third Amended Complaint. Defs.' Br. in Support of Mot. to Dismiss 12-14.

<sup>6</sup> Defendants have not identified the Counts to which this portion of their Motion to Dismiss applies. Defs.' Br. in Support of Mot. to Dismiss 14-17.

party to the suit and acknowledges that the employee's conduct arose out of the course and scope of their employment;" and (2) "[t]here has been an acknowledgement by [the District] that . . . Walsh [acted] within the course and scope of his employment." Defs.' Br. in Support of Mot. to Dismiss 14-17 (citing § 2-9-305(5), MCA; *Kenyon v. Stillwater County*, 254 Mont. 142, 145-147, 835 P.2d 742, \_\_\_\_ (1992); *Germann v. Stephens*, 2006 MT 130, ¶¶ 7, 15-16, 41, 47, 53, 332 Mont. 303, 137 P.3d 545; *Story v. City of Bozeman*, 259 Mont. 207, 220-222, 856 P.2d 202, 210-211 (1993); *Stansbury v. Lin*, 257 Mont. 245, 250, 848 P.2d 509, \_\_\_\_ (1993); *Aff. Marc Glines* ¶ 11).

#### G. Remedies<sup>7</sup>

In support of their contention that "[Kelley] requests remedies . . . that cannot be granted as a matter of law," Defendants argue that: (1) "[t]here is . . . nothing in the allegations that [could] form the basis for injunctive relief;" (2) "Kelley's request for declaratory relief is . . . baseless;" (3) "Kelley . . . cannot seek recovery of attorney fees . . . because he is not a licensed attorney in the State of Montana[,], nor is he being represented by a licensed attorney;" (4) Kelley cannot seek reimbursement to the District because he "has not named the District as a party to this action;" (5) "[t]here are no set of facts that . . . Kelley can prove that would entitle him to a writ of manda[mus] [compelling] the District to comply with the Open Meeting Law and the notice requirements of the Public Participation [L]aw ([§ 2-3-104, MCA]) . . . [because] [t]here was no violation of either law;" (6) "[p]unitive damages are not available against Defendants [pursuant to § 2-9-105, MCA];" (7) "[t]he District is obligated to provide for the defense and indemnification of its employees and board members acting within their duties;" and (8) "[a] claim for unjust enrichment is legally improper when

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<sup>7</sup> Defendants have not identified the Counts to which this portion of their Motion to Dismiss applies. Defs.' Br. in Support of Mot. to Dismiss 10-12, 17-19.

there is a contract.” Defs.’ Br. in Support of Mot. to Dismiss 11, 17-19 (citing *Marbut v. Secretary of State*, 231 Mont. 131, 135, 752 P.2d 148, 150 (1988); § 37-61-215, MCA; Aff. Ginger Martello ¶ 9-11; Aff. Marc Glines ¶¶ 4-7; *Stewart v. State*, 135 Mont. 323, 327, 340 P.2d 151, 153 (1959); § 2-9-105, MCA; § 2-9-305, MCA; § 20-3-332, MCA; *Maxted v. Barrett*, 198 Mont. 81, 87, 643 P.2d 1161, 1164 (1982)).

### III. Kelley’s Answer Brief (Ct. Doc. 70)

#### A. Exhaustion of Administrative Remedies

In response to Defendants’ contention that “[Kelley] has failed to exhaust the administrative remedies required to file claims challenging decisions of the [Board] . . . ,” Kelley argues that he “need not exhaust administrative remedies” because: (1) exhaustion is not required when “the matter is governed by a specific statute” or the Board has “acted without jurisdiction or in excess of its jurisdiction;” (2) this matter is governed by “specific statute[s];” and (3) the Board acted “without jurisdiction or in excess of its jurisdiction” by committing fraud. Kelley’s Ans. Br. 11-14, 16-17 (Jan. 4, 2011) (citing § 2-9-305(6)(a), M.R.Civ.P.; § 19-20-731, MCA; § 20-3-210(2)(b)-(c), MCA; § 20-3-332(2), MCA; § 20-7-701, MCA; § 20-9-208(2)(a)(i), MCA; § 20-9-213(1), MCA; § 20-10-101(4)-(5), MCA; § 20-10-143, MCA; *Nichols v. School District No. 3, Ravalli County*, 87 Mont. 181, 188, 287 P. 624, \_\_\_\_ (1930); *Chastain v. Mauldin*, 32 S.W.2d 235, 237 (Tex. App. 1930); *Committee for an Effective Judiciary v. State*, 209 Mont. 105, \_\_\_\_, 679 P.2d 1223, \_\_\_\_ (1984)).

#### B. Statute of Limitations

In response to Defendants’ contention that “[Kelley’s] claims are premised on allegations that fall significantly beyond the applicable statute of limitations,” Kelley argues that: (1) “the statute of limitations for an action based on fraud begins when the fraud occurs



unless the facts which form the basis for the allegation are, by their nature, concealed;” and (2) there is “substantial evidence of concealment” in this case. *Cartwright v. Equitable Life Assurance Society of the United States*, 276 Mont. 1, 14, 914 P.2d 976, 985 (1996); Kelley’s Ans. Br. 3-8 (citing § 2-2-104(3)(a),(c), MCA; § 20-9-204, MCA; Kelley’s 3d Amend. Compl. ¶¶ 19-20, 22, 24, 29-30, 38, 41-45, 47-52, 56, 64, 75, Attachments M, Q, QC2, R, S, T, U).

#### C. Necessary Parties

In response to Defendants’ contention that “[Kelley] has failed to name necessary parties . . . ,” Kelley argues that: (1) the Board is not a “necessary party” because “[e]veryone on the Board is named individually, in their capacity as Board members;” and (2) the District is not a “necessary party” because, “[a]s a taxpayer, . . . [Kelley can] seek to recover, for the District, funds that have been spent illegally by the Board.” Kelley’s Ans. Br. 17-18, n.1 (citing *Fennessy v. Dorrington*, 306 Mont. 307, 309, 32 P.3d 1250, \_\_\_\_ (2001)).

#### D. Moot

In response to Defendants’ contention that “[s]ome of . . . Kelley’s claims . . . are moot because the District has proactively addressed . . . Kelley’s challenges,” Kelley argues that Count 6 is not moot because “there is an ongoing pattern of [Defendants] violating the Open Meeting [Law].” Kelley’s Ans. Br. 19-20 (citing Final Budget Meeting/Regular Bd. Meeting Final Agenda 1-5 (Aug. 11, 2008); Reg. Bd. Meeting Final Agenda 1, 7 (Sept. 8, 2008)).

#### E. Standing

In response to Defendants’ contention that “[Kelley] has failed to establish that he has standing . . . ,” Kelley argues that he has standing pursuant to: (1) “[t]he doctrine of taxpayer standing to challenge illegal expenditures of local government monies . . . ;” and (2) the

Montana Supreme Court's recognition that private parties have standing to "vindicate the public interest in cases involving important public issues." Kelley's Ans. Br. 8-11 (citing *School District No. 2*, 62 Mont. at 147, 205 P. at \_\_\_\_; *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923); *Crampton v. Zabriskie*, 101 U.S. 601, 609 (1879); *Grossman v. State*, 209 Mont. 427, 438, 682 P.2d 1319, \_\_\_\_ (1984); *Hickey v. Baker School District No. 12*, 2002 MT 322, \_\_\_\_, 313 Mont. 162, 60 P.3d 966; *Helena Parents Commission v. Lewis and Clark County Commissioners*, 277 Mont. 367, 374, 922 P.2d 1140, \_\_\_\_ (1996)).

#### F. Immunity

In response to Defendants' contention that "Walsh is immune from . . . suit," Kelley argues that "Walsh has no immunity with respect to fraud." Kelley's Ans. Br. 17 (citing § 2-9-305(6), MCA).

#### G. Remedies

In response to Defendants' contention that "[Kelley] requests remedies . . . that cannot be granted as a matter of law," Kelley argues that: (1) "[t]his Court has the power and should compel the performance of those statutorily mandated (ministerial duties) imposed upon school boards when those duties are being ignored as with [Defendants] herein;" (2) a writ of mandamus is proper pursuant to § 27-26-102, MCA; (3) removal of trustees is proper pursuant to § 20-3-310, MCA; (4) reimbursement of funds to the District is proper pursuant to *School District No. 2*, 62 Mont. at \_\_\_\_, 205 P. at \_\_\_\_; (5) an award of punitive damages is not prohibited by § 2-9-105, MCA since Walsh is not "the State" or a "governmental entity;" (6) "unjust enrichment is plainly an appropriate cause of action" since the contracts at issue should be declared null and void; and (7) all other requested remedies are appropriate pursuant to the Court's "inherent power to craft a remedy." Kelley's Ans. Br. 19-20 (citing §

2-9-105, MCA; § 20-3-310, MCA; § 20-9-204(3), MCA; § 27-26-102, MCA; § 28-2-102, MCA; *Restatement (Second) of Torts* § 874A (\_\_\_\_); Kelley's 3d Amend. Compl. ¶¶ 7, 9, 11-13, 15, 21-23, 32, 53-54, 59, 91, 97).

#### IV. Defendants' Reply Brief (Ct. Doc. 73)

##### A. Exhaustion of Administrative Remedies

In response to Kelley's contention that he "need not exhaust administrative remedies" because this matter is governed by "specific statute[s]," Defendants argue that: (1) "[r]egardless of how . . . Kelley would like to frame his claims, he cannot escape the fact that he is challenging the substance of the Board's employment and financial management decisions;" and (2) to challenge these decisions, Kelley must first exhaust his administrative remedies with the Madison County Superintendent. Defs.' Reply Br. 3-6 (Jan. 18, 2011) (citing *Jarussi v. Board of Trustees of School District No. 28*, 204 Mont. 131, \_\_\_, 664 P.2d 316, \_\_\_ (1983)).

In response to Kelley's contention that he "need not exhaust administrative remedies" because the Board has "acted without jurisdiction or in excess of its jurisdiction," Defendants argue that the Board acted within its jurisdiction because it is within the Board's jurisdiction to make employment and financial management decisions on behalf of the District. Defs.' Reply Br. 3-6 (citing § 20-3-324, MCA; Mont. Const. art. X, § 8; *Good Schools Missoula, Inc.*, ¶¶ 4, 6, 8, 21-22; *Jarussi*, 204 Mont. at 135, 664 P.2d at 318).

##### B. Statute of Limitations

In response to Kelley's contention that the statute of limitations has not run because there is "substantial evidence of concealment" in this case, Defendants argue that: (1) "[t]he District's records upon which . . . Kelley relies . . . have been open for inspection and review

since their creation;” (2) “Kelley has not and cannot allege that [these] records were intentionally withheld and not produced;” (3) “Kelley’s own actions in filing suit shortly after receiving these [records] indicates that [they] were capable of being discovered upon request;” (4) “[t]he fact that no one prior to . . . Kelley, and [Kelley] only . . . shortly before he filed suit, requested these records does not mean that [they] were concealed or . . . incapable of being discovered;” (5) “[t]he decisions [at issue] . . . were made during public Board meetings . . . ;” and (6) Kelley’s contentions to the contrary are based on “unsupported speculation as to what he believes may have occurred . . . .” Defs.’ Reply Br. 7-10.

#### C. Necessary Parties

In response to Kelley’s contention that the Board is not a “necessary party” because “[e]veryone on the Board is named individually, in their capacity as Board members,” Defendants argue that the Board is a “necessary party” because the individual trustees named as defendants cannot individually act on behalf of the Board or the District. Defs.’ Reply Br. 2-3 (citing *School District No. 2*, 62 Mont. at \_\_\_\_, 205 P. at \_\_\_\_).

Defendants response to Kelley’s contention that the District is not a “necessary party” because, “[a]s a taxpayer, . . . [Kelley can] seek to recover, for the District, funds that have been spent illegally by the Board,” is addressed in Section IV(E) of this Decision and Order.

#### D. Moot

In response to Kelley’s contention that Count 6 is not moot because “there is an ongoing pattern of [Defendants] violating the Open Meeting [Law],” Defendants argue that: (1) “[t]here is a 30-day statute of limitations for alleging an Open Meeting Law violation;” (2) “nothing . . . suggests that the closed sessions of the Board were held in violation of [the] Open Meeting Law;” and (3) “[m]eetings may be held in closed session where the

individual's rights of privacy clearly exceed the public's right to know as well as to discuss litigation strategy." Defs.' Reply Br. 11 (citing § 2-3-203(3), MCA; § 2-3-213, MCA).

#### E. Standing

In response to Kelley's contention that he has standing pursuant to "[t]he doctrine of taxpayer standing to challenge illegal expenditures of local government monies . . . ," Defendants reassert that: (1) "[i]n and of itself, being a taxpayer within the District is not enough to establish standing -- there must also be a 'personal interest and injury beyond that common interest of all citizens and taxpayers;'" and (2) "Kelley has failed to allege any specific injuries beyond that which all taxpayers in the . . . District would experience if any of his allegations . . . were true . . . ." Defs.' Reply Br. 14-17.

In response to Kelley's contention that he has standing pursuant to the Montana Supreme Court's recognition that private parties have standing to "vindicate the public interest in cases involving important public issues," Defendants argue that "there is nothing in the [Montana] Supreme Court decision [upon which Kelley relies (i.e. *Committee for an Effective Judiciary*)] to suggest that [private parties seeking to 'vindicate the public interest'] do not have to . . . allege an injury distinguishable from other taxpayers." Defs.' Reply Br. 17 (citing *Committee for an Effective Judiciary*, \_\_\_\_; *Missoula City-County Air Pollution Control Board v. Board of Environmental Review*, 282 Mont. 255, 260, 937 P.2d 463, 466 (1997)).

#### F. Immunity

In response to Kelley's contention that "Walsh has no immunity with respect to fraud," Defendants argue that: (1) § 2-9-305(5), MCA "makes clear, the only exceptions that would bar immunity, where there is an acknowledgement that the acts fell within the course

and scope of the employee's employment, are those found in [§ 2-9-305(6)(b), MCA] through [§ 2-9-305(6)(d), MCA];" and (2) § 2-9-305(6)(b), MCA through § 2-9-305(6)(d), MCA do not contain a fraud exception. Defs.' Reply Br. 18-19.

#### G. Remedies

In response to Kelley's contention that a writ of mandamus is proper pursuant to § 27-26-102, MCA, Defendants reassert that: (1) "[t]here are no set of facts that . . . Kelley can prove that would entitle him to a writ of manda[mus] [compelling] the District to comply with the Open Meeting Law and the notice requirements of the Public Participation [L]aw . . . [because] [t]here was no violation of either law;" and (2) "[e]ven if . . . Kelley could establish violations of these laws, a writ of manda[mus] 'is not a proper tool to compel a party to correct or revise erroneous action already taken.'" Defs.' Reply Br. 19 (quoting *Castles v. State*, 187 Mont. 356, 361-362, 609 P.2d 1223, \_\_\_\_ (1980)).

Defendants have not responded to Kelley's contention that removal of trustees is proper pursuant to § 20-3-310, MCA. Defs.' Reply Br. 1-20.

In response to Kelley's contention that reimbursement of funds to the District is proper pursuant to *School District No. 2*, 62 Mont. at \_\_\_\_, 205 P. at \_\_\_\_, Defendants argue that "[i]f Kelley were to succeed in [his claims] . . . the harm would be to TRS . . . [because TRS], not the District, has paid out retirement benefits to . . . Walsh." Defs.' Reply Br. 16-17.

Defendants have not responded to Kelley's contention that an award of punitive damages is not prohibited by § 2-9-105, MCA since Walsh is not "the State" or a "governmental entity." Defs.' Reply Br. 1-20.

In response to Kelley's contention that "unjust enrichment is plainly an appropriate cause of action" since the contracts at issue should be declared null and void, Defendants

argue that the contracts “do not fail because there was consideration and a lawful object.” Defs.’ Reply Br. 11-12 (citing § 20-3-342(2), MCA; § 20-9-204, MCA; § 27-2-211, MCA; *Norwood v. Service Distributing, Inc.*, 2000 MT 4, ¶ 32, 297 Mont. 473, 994 P.2d 25). According to Defendants, Kelley’s contentions to the contrary are “[w]ithout legal [and/or factual] support.” Defs.’ Reply Br. 11-12.

Defendants have not responded to Kelley’s contention that all other requested remedies are appropriate pursuant to the Court’s “inherent power to craft a remedy.” Defs.’ Reply Br. 1-20.

## **DISCUSSION**

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true.

*Powell v. Salvation Army*, 287 Mont. 99, 102, 951 P.2d 1352, 1354 (1997) (quoting *Wilson v. Taylor*, 194 Mont. 123, 126, 634 P.2d 1180, 1182 (1981)).

### **A. Exhaustion of Administrative Remedies**

Defendants’ contention that “[Kelley] has failed to exhaust the administrative remedies required to file claims challenging decisions of the [Board] . . .” has merit. Defs.’ Br. in Support of Mot. to Dismiss 4-6; Defs.’ Reply Br. 3-6. To challenge decisions of the Board, an action must be filed with the Madison County Superintendent within 30 days of the challenged decision, unless: (1) “a state agency has been granted primary jurisdiction over the matter;” (2) “the matter is governed by a specific statute;” or (3) “the [Board] has acted without jurisdiction or in excess of its jurisdiction.” Section 20-3-210, MCA; *Good Schools*

*Missoula, Inc.*, ¶¶ 22, 24. With the exception of Count 6, Kelley’s Third Amended Complaint pertains to employment and financial management decisions made by the Board. Kelley’s 3d Amend. Compl. ¶¶ 7-115. These decisions: (1) are within the Board’s jurisdiction; and (2) are not governed by any “specific statute” that alleviates Kelley’s obligation to exhaust his administrative remedies with the Madison County Superintendent. Defs.’ Reply Br. 3-6; § 20-3-210, MCA; *Good Schools Missoula, Inc.*, ¶¶ 22, 24. Moreover, it is undisputed that: (1) a “state agency” has not been granted “primary jurisdiction” over this matter; and (2) Kelley did not file an action with the Madison County Superintendent within 30 days of the decisions he seeks to challenge. Kelley’s Ans. Br. 1-20. Consequently, Kelley’s failure to exhaust his administrative remedies supports dismissing Counts 1, 2, 3, 4, 5, 7, 8, and 9 of his Third Amended Complaint with prejudice.

B. Statute of Limitations

Defendants’ contention that “[Kelley’s] claims are premised on allegations that fall significantly beyond the applicable statute of limitations” has merit. Defs.’ Br. in Support of Mot. to Dismiss 6-9; Defs.’ Reply Br. 7-10. Actions for relief based on fraud must be filed within two years unless: (1) “the facts constituting the claim are by their nature concealed or self-concealing;” or (2) “before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause.” Section 27-2-102(3), MCA; § 27-2-203, MCA. In his Third Amended Complaint, Kelley alleges that Defendants “have endeavored to hide [Walsh’s] fraudulent contracts from the public.” Kelley’s 3d Amend. Compl. ¶ 8. “Taken as true,” this allegation tolls the statute of limitations, but only until “the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered . . . .” Section 27-2-102(3), MCA;



*Cartwright*, 276 Mont. at 14, 914 P.2d at 985; *Powell*, 287 Mont. at 102, 951 P.2d at 1354 (quoting *Wilson*, 194 Mont. at 126, 634 P.2d at 1182). The allegations upon which Kelley's fraud claims are based "date back to 2001" and, since they are based on public records, "in the exercise of due diligence, should have been discovered" prior to Kelley initiating this action on August 23, 2010. Kelley's 3d Amend. Compl. ¶¶ 7-115; Defs.' Br. in Support of Mot. to Dismiss 6-9; Defs.' Reply Br. 7-10. Consequently, the statute of limitations supports dismissing Counts 1, 2, 3, and 9 of Kelley's Third Amended Complaint with prejudice.

C. Necessary Parties

Defendants' contention that "[Kelley] has failed to name necessary parties . . ." has merit. Defs.' Br. in Support of Mot. to Dismiss 3-4; Defs.' Reply Br. 2-3. The Board and the District are "necessary parties" since: (1) the individual trustees named as defendants do not have the authority to act on their own behalf; (2) the individual trustees named as defendants are immune from liability; (3) the decisions at issue were made by the Board as a whole; (4) all of the trustees who were on the Board when the decisions at issue were made have not been named as defendants; (5) "Kelley . . . has alleged that [t]his [action] is for the benefit of the District;" and (6) "[w]ithout the District as a party to this action, . . . Kelley is not entitled to the relief he seeks." Rule 19(a), M.R.Civ.P.; Defs.' Br. in Support of Mot. to Dismiss 3-4 (citing § 20-3-322(4), MCA; § 20-3-332, MCA; *School District No. 2*, 62 Mont. at \_\_\_\_, 205 P. at \_\_\_\_). Consequently, Kelley's failure to name "necessary parties" supports dismissing Kelley's Third Amended Complaint, in its entirety, with prejudice.

D. Moot

Defendants' contention that "[s]ome of . . . Kelley's claims . . . are moot because the District has proactively addressed . . . Kelley's challenges" has merit. Defs.' Br. in Support of

Mot. to Dismiss 9-10; Defs.' Reply Br. 11. The consequence for violating the Open Meeting Law is a judicial declaration that the decisions made in the course of the violation are void. Section 2-3-213, MCA. The August 9, 2010 hearing, which is the only hearing identified in Kelley's Third Amended Complaint as being held in violation of the Open Meeting Law, was re-heard, in open session, on August 31, 2010. Kelley's 3d Amend. Compl. ¶¶ 107-111; Defs.' Br. in Support of Mot. to Dismiss 9-10; Aff. Marc Glines ¶ 7. Thus, there is nothing to void with regard to the August 9, 2010 hearing. Moreover, the additional hearings Kelley now contends were held in violation of the Open Meeting Law were not challenged within the applicable 30-day statute of limitations. Section 2-3-213, MCA; Kelley's Ans. Br. 19-20. Consequently, Defendants' contention that "[s]ome of . . . Kelley's claims . . . are moot" supports dismissing Count 6 of Kelley's Third Amended Complaint with prejudice.

E. Standing

Defendants' contention that "[Kelley] has failed to establish that he has standing . . ." has merit. Defs.' Br. in Support of Mot. to Dismiss 12-14; Defs.' Reply Br. 14-17.

To establish standing to bring suit, the complaining party must (1) clearly allege past, present, or threatened injury to a property right or a civil right, and (2) allege an injury that is distinguishable from the injury to the public generally, though the injury need not be exclusive to the complaining party . . . . [P]ersons who fail to allege any personal interest or injury, beyond that common interest of all citizens and taxpayers, lack standing . . . . The injury alleged must be personal to the plaintiff as distinguished from the community in general.

*Fleenor*, ¶ 9 (citing *Flesh v. Board of Trustees of Joint School District # 2, Mineral and Missoula Counties*, 241 Mont. 158, 162, 786 P.2d 4, 7 (1990); *Carter v. Montana Department of Transportation*, 274 Mont. 39, 42, 905 P.2d 1102, 1104 (1995)). Kelley has not alleged a "personal interest or injury, beyond that common interest of all citizens and taxpayers."

Kelley's 3d Amend. Compl. ¶¶ 7-115; *Fleenor*, ¶ 9. Consequently, Kelley lacks standing, which supports dismissing his Third Amended Complaint, in its entirety, with prejudice.

F. Immunity

Defendants' contention that "Walsh is immune from . . . suit" has merit. Defs.' Br. in Support of Mot. to Dismiss 14-17; Defs.' Reply Br. 18-19.

In an action against a governmental entity, the employee whose conduct gave rise to the suit is immune from liability by reasons of the same subject matter if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of the employee's employment, unless . . . the conduct of the employee constitutes a criminal offense as defined in Title 45, chapters 4 through 7 . . . .

Section 2-9-305(5), MCA; § 2-9-305(6)(b), MCA. The District has acknowledged that the conduct upon which Kelley's claims are brought "arises out of the course and scope of [Walsh's] employment" and Kelley has not alleged that Walsh's conduct "constitutes a criminal offense." Defs.' Br. in Support of Mot. to Dismiss 14-17; Aff. Marc Glines ¶ 11; Kelley's Ans. Br. 1-20. Consequently, Walsh is immune from suit, which supports dismissing Kelley's Third Amended Complaint, to the extent that it pertains to Walsh personally, with prejudice.

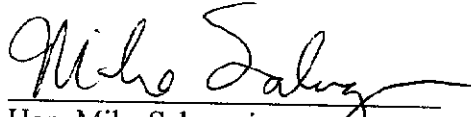
G. Remedies

Pursuant to Sections A-F of the "Discussion" portion of this Decision and Order, Kelley's Third Amended Complaint should be dismissed with prejudice, in its entirety, for failure to state a claim upon which relief can be granted. Rule 12(b)(6), M.R.Civ.P. Consequently, it is unnecessary for the Court to discuss Defendants' contention that "[Kelley] requests remedies . . . that cannot be granted as a matter of law." Defs.' Br. in Support of Mot. to Dismiss 11, 17-19.

IT IS HEREBY ORDERED:

1. Defendants' Motion to Dismiss is **GRANTED**.
2. Kelley's Third Amended Complaint is **DISMISSED WITH PREJUDICE**.

Dated this 7th day of August, 2011.

  
Hon. Mike Salvagni  
District Judge *01-20-2010-70*

c: David Kelley  
P.O. Box 152  
Ennis, MT 59729

Elizabeth Kaleva / Megan Morris